No. 11805.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE C. WATSON,

Appellant,

vs.

DECONHIL STEAMSHIP COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE.

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Jurisdictional Statement.

The appellant commenced a suit in Admiralty against appellee in the United States District Court, Southern District of California, Central Division, purportedly pursuant to the provisions of the statute commonly known as the Jones Act (Title 46, U. S. C. A., Sec. 688). The appellant alleges in the First Article of his libel that the principal place of business of the appellee was in the County of Los Angeles, State of California. There is no allegation in the libel stating that the appellant and appellee were, at the time of the alleged injury, engaged in interstate or foreign commerce. There is no allegation that there was any defect or insufficiency in the vessel or its appliances. There is no allegation that any fellow servant of appellant negligently did any act or negligently failed to do any act. All that the libel alleges with refer-

ence to claimed negligence is a conclusion in the Tenth Article that "libelant stepped into a bucket negligently and carelessly left upon said second step of said stairway, precipitating and throwing the plaintiff (*sic*) to the deck below, a distance of approximately ten feet." [Ap. 6.]

The Jones Act, in so far as it is relevant here, provides, in part, as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States *modifying* or *extending* the common law right or remedy in cases of personal injury to railway employees *shall* apply; . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Emphasis added.)

The only statute of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees is the Federal Employers' Liability Act, found in 45 U. S. C. A., Secs. 51, *et seq.*

Appellee is familiar with the decisions of the United States Supreme Court, various Circuit Courts of Appeal and *nisi prius,* that the language "jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located" means nothing more than venue.

It is an elementary rule that the doctrine *stare decisis* has no application whatever in any case where the particular point raised was not decided, even though it was

dormant in the case and lurked within the record. The United States Supreme Court has adverted to this elementary principle in *Pacific S. S. Co. v. Peterson,* 278 U. S. 130, 73 L. Ed. 220, as follows:

> "And while an incidental statement in the Engel Case at p. 36, if taken broadly, might well be understood to mean that the right to recover compensatory damages under the new rule was granted as an alternative to the allowances covered by the old rules, including maintenance, cure and wages, this was at the most a general expression respecting a particular as to which no question was raised,—no allowance for maintenance, cure, and wages being there involved,—which ought not to control the judgment in a subsequent suit when the very point is presented for decision (citing cases), or to prevent the determination as an original question of the proper construction of the statute in *that* particular." (Emphasis added.)

Appellee raises certain points which it does not believe have ever been decided by the United States Supreme Court in connection with the question of jurisdiction. If, as the Jones Act plainly says, all statutes of the United States modifying or extending the common law right or *remedy* in cases of personal injury to railway employees *shall* apply then it is a certainty that the employer has as much right to a jury trial as has the employee. Under the provisions of the Federal Employers' Liability Act injured employees must bring their actions either in a state court or on the *law side* in a federal court. Under the law, including not only the Federal Employers' Liability Act, but the rules of Civil Procedure, either party is entitled as a matter of right to a trial by jury.

It is the contention of the appellee in the case at bar that any construction of the Jones Act, bottomed as it is on portions of the Federal Employers' Liability Act, which deprives the employer of the right to a trial by jury, is in contravention of the provisions of the Fifth Amendment to the Constitution of the United States. One of the fundamental requisites of due process of law is that there be no favoritism shown by any court to one of the parties to an action. The appellee in the case at bar is entitled to the equal protection of the laws. Section 53 (45 U. S. C. A.) states that the *jury* may diminish the damages in proportion to the amount of negligence attributable to the injured employee. This is one of the sections which modifies the common law right of a railway employee for the reason that under the common law contributory negligence was a complete bar. Therefore, as a matter of law, Section 53 *shall* apply as provided in the Jones Act.

Appellee further contends that a fair, impartial construction of the Jones Act precludes any court from holding that the words "with the right of trial by jury" do not give the employer as much right to such trial as they do to the employee. The statute does not say that the seaman may elect *not* to have a trial by jury and thereby preclude the employer from having the right of trial by jury. The statute plainly says that if the seaman elects to take advantage of the provisions of the Jones Act there is a right of trial by jury and such right is a substantial right vested in each of the parties. Such right can only be waived in the manner provided by law in accordance with the provisions of the Rules of Civil Procedure.

Any court-made rule which deprives either party to an action of the right to a trial by jury contravenes the due

process clause of the Fifth Amendment to the Constitution of the United States.

The general scope of the prohibitions of the Fifth Amendment as against the Federal Government is frequently measured by the settled scope of the Fourteenth Amendment as against the States. The Court has proceeded on the assumption "that the legal import of the phrase 'due process of law' is the same in both amendments." (*French v. Barber Asphalt Paving Co.,* 181 U. S. 324, 329.)

Amendment VII, Constitution of the United States, provides in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. This amendment applies only to courts sitting under the authority of the United States but it does apply to such courts. (*Pearson v. Yewdall,* 95 U. S. 294.)

An order of a federal district court transferring a count in an action at law for damages, to the equity docket upon the ground that under the law of the State it could not be entertained at law, is a deprivation of the right of trial by jury. (*Re Simons,* 247 U. S. 231.)

It is the direct contention of the appellee in the case at bar that it is entitled, as a matter of right, pursuant to the Fifth Amendment and the Seventh Amendment to the Constitution of the United States to a trial by jury.

Turning now to the Fourteenth Amendment, we find that the essentials of due process require that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil

rights and that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances. (*Barbier v. Connolly,* 113 U. S. 27.)

The provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws is associated in the amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. (*Truax v. Corrigan,* 257 U. S. 312.)

The Jones Act uses plain, unambiguous language. It does not say that "any seaman who shall suffer personal injury in the course of his employment as a proximate result of negligence on the part of any agent or servant of his employer may maintain an action for damages in

any court of competent jurisdiction." The statute says very plainly that any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in *such* action all statutes of the United States modifying or extending the common law right in cases of personal injury to railway employees *shall* apply. In plain words the Congress placed seamen *and the employers of seamen* in exactly the same legal position as railway employees and their employers pursuant to the Federal Employers' Liability Act to the extent that said Federal Employers' Liability Act *modified* or *extended* the common law right or *remedy* in such cases. No one will contend that the employee of a railway could, regardless of whether he commences his action in a state or federal court, deprive the employer of the absolute right of trial by jury. An action under the Jones Act, according to its plain language is "an action for damages at law," with the right of trial by jury. The statute does not say that the seaman pursuing his right to maintain an action for damages at law may elect whether such action will be tried by a court sitting without a jury or by a court sitting with a jury.

Appellee calls to the attention of this Honorable Court the fact that the United States Supreme Court has never been called upon to consider or decide what is meant by the language "all statutes of the United States *modifying* or *extending* the common law right or remedy in cases of personal injury to railway employees." Prior to the enactment of the Federal Employers' Liability Act, an employee of a railroad, engaged in intrastate or interstate commerce, had a right of action for damages under the common law, in the event he was injured as the

proximate result of a negligent failure on the part of his employer to furnish a reasonably safe place in which to work or reasonably safe tools and appliances with which to do the work. Such employee could not recover in the event he was guilty of contributory negligence, and assumption of risk was also a complete defense. The common law right available to such employees was modified by the Federal Employers' Liability Act because it gave to such employee the right to recover something in any event, regardless of his contributory negligence, by reason of any injury resulting in whole or in *part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to *its* (the railroad company's) negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Probably the most important modification of the common-law was the removal of the defense based on the fellow-servant doctrine.

In *Minneapolis & St. L. R. Co. v. Bombolis,* 241 U. S. 211, 60 L. Ed. 961, the Court says:

> "The proposition that, as the 7th Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress, and regulate the enforcement of such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore that its terms have no relation whatever to the enforcement of rights in other

> forums merely because the right enforced is one conferred by the law of the United States. And of course it is apparent that to apply the constitutional provision to a condition to which it is not applicable would be not to interpret and enforce the Constitution, but to distort and destroy it.

A Court of Admiralty cannot entertain an "action at law" or afford a trial by jury. The decisions of the various federal courts upholding the right of a seaman to proceed on the admiralty side of the court also ignore that provision of the Seventh Amendment which guarantees that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law for the reason that the Circuit Courts of Appeal and the United States Supreme Court have decided that in all appeals prosecuted from decrees entered in maritime causes of action tried on the admiralty side of the court there is a trial *de novo* and that the Appellate Court may ignore the findings of fact made by the trial judge. This rule also is in direct conflict with the decision of the United States Supreme Court that the administration of the substantive rules applicable in fixing liability in all maritime causes of action shall be uniform throughout the courts of the United States and *common law courts* in the various States.

A classic example of the statement of this rule is the very recent decision of the United States Supreme Court in *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 87 L. Ed. 239, where the Court says:

> "It must be *remembered* that the state courts have *concurrent* jurisdiction with the federal courts to try actions either under the Merchant Marine Act or *in*

personam such as maintenance and cure. The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the *remedy* afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants *full* protection for *all* substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And Admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under Section 237(b) of the Judicial Code, 28 USCA Sec. 344(b)." (Emphasis added.) (317 U.S. at 245, 246, 87 L. Ed. 243, 244.)

Appellee calls the attention of this Honorable Court to the decision of the United States Supreme Court in *Panama R. Co. v. Johnson,* 264 U. S. 375, 68 L. Ed. 748. It is essential to keep in mind in reading this decision that Johnson commenced an action for damages on the *law* side of the District Court of the Eastern District of New York and that there was an actual trial by jury. Therefore the specific question whether the deprivation of a

trial by jury when demanded by an employer in any action prosecuted under the Jones Act contravened the rights of the employer guaranteed by the Fifth Amendment and the Seventh Amendment to the Constitution of the United States was not before the court and whatever was said by the court in the course of its decision on that subject is *obiter dicta.* Johnson did not bring his action in the district of the defendant's residence or principal office and the defendant objected that the District Court could not entertain it. The objection was not made on a special appearance but after the defendant had appeared generally and demurred to the complaint. The trial court thought the objection went to the venue only and was waived by a general appearance. The Federal Rules of Civil Procedure were not then in existence. The objection was overruled (277 Fed. 859). Error was assigned on that specific ruling when the case was argued before the United States Supreme Court.

The defendant also attacked the Jones Act upon the ground that it was in conflict with Section 2 of Article III of the Constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. The Court says:

> "The particular grounds on which a conflict with Sec. 2 of article 3 is asserted are that the statute enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction, and to have it determined according to the principles of a different system, applicable to a distinct and irrelevant field, and also disregards the restriction in respect of uniformity. For reasons which will be stated we think neither ground can be sustained. (264 U. S. at 387, 68 L. Ed. at 753.)"

The only other constitutional point asserted was that the Jones Act conflicts "with the due process of law clause of the Fifth Amendment, in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbitrary. The complaint is *not* directed against either measure of redress or either form of action, but *only against the right of election as given.* Of course, the objection must fail." (264 U. S. at 392, 68 L. Ed. at 755.) (Emphasis added.)

The Panama Railroad Company was not, under the facts, entitled to raise the objection that the *assumed* right of a seaman to elect whether he would proceed on the admiralty side or the law side of a federal court violated any constitutional right of the defendant for the simple reason that the action was brought on the common law side of a District Court of the United States and a jury trial was had.

The United States Supreme Court was not called upon to decide whether the words "at his election" as used in the Jones Act meant an election as between various forums or even whether those words referred to election of remedies. The decision of the Honorable Supreme Court indicates, although proctor for appellee has not read the briefs in that case or the assignments of error, that the railroad company assumed as the premise of its contention that the statute contravened the Fifth Amendment to the Constitution and that the phrase "at his election" referred to the right of the seaman to commence his action in a United States District Court on the admiralty side or on the law side or in a state court. Ap-

pellee here contends that the phrase "at his election" was used by the Congress in light of the well known and elementary rules respecting election of *remedies,*—not selection of a particular *forum.* This contention is fortified by a résumé of the rights of a seaman suffering personal injury prior to the enactment of the Jones Act. In each such case, there being no statute of the United States specifying particularly, or otherwise or at all, that any seaman suffering personal injury in the course of his employment might maintain an action for damages at law, with or without the right of trial by jury, all actions by seamen who had suffered personal injury while acting in the course of their employment were governed by Section 2, Article 3 of the Constitution of the United States which states that "the judicial power (of the United States) shall extend . . . to all cases of admiralty and maritime jurisdiction" and Sections 24 and 256 of the Judicial Code whereby the district courts are given exclusive original jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

There is an important distinction between the manner in which the improper venue could have been raised at the time Johnson filed his action against the Panama Railroad Company and the law with respect thereto in effect when appellant filed his action here. General Admiralty Rule 44 provides that:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration

of justice, provided the same are not inconsistent with these rules."

There is absolutely nothing in the general admiralty rules promulgated by the United States Supreme Court which provides a method by which an alleged employer-respondent sued in a Jones Act case in a court of a district other than the district in which the employer resides or in which his principal office is located, may object to the fact that the employer has been sued in a district other than the district in which his principal office is located, prior to the filing of an answer. In the case at bar the appellant, although under oath, falsely alleged that the Deconhil Shipping Company had "its principal place of business in the County of Los Angeles, State of California." [Ap. 3.]

The local rules promulgated by the Judges of the District Court of the United States, for the Southern District of California, provide that:

> "Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the FRCP, or of these rules, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States, shall be applied or, in default thereof, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." (Rule 29.)

Pursuant to the foregoing local rule, it is clear that the appellee was entitled to present its defense of improper venue in its pleading responsive to the libel according to the provisions of Rule 12(b) F. R. C. P.

Pursuant to the basic law set forth in the Constitution and implemented by the statute as contained in the Judicial Code, an injured seaman could maintain an action for damages for personal injuries in the event he suffered injury in consequence of the unseaworthiness of the vessel or a failure on the part of his employer to furnish and keep in order the proper appliances appurtenant to the ship, in any of the following forums:

1. On the admiralty side of a district court of the United States;

2. On the law side of a district court of the United States;

3. In any state court where jurisdiction over the person of the employer could be obtained.

If the seaman maintained his action on the law side of a district court of the United States or in any state court, both or either of the parties could, as a matter of right, demand a jury trial.

Of course, the Judicial Code, if constitutional when applied to causes of admiralty and maritime jurisdiction commenced on the law side of the court, would require the stating of a cause of action in excess of the minimum jurisdictional amount and the existence of diversity of citizenship.

Considerable doubt is cast upon the soundness of any contention that the law side of a United States District Court would be without jurisdiction in the absence of allegations showing a dispute in excess of the ordinary jurisdictional amount in any maritime cause of action by

an incidental statement in the case of *Panama R. Co. v. Johnson,* 264 U. S. 375, at 383, 384, where the Court said:

> "The case arose under a law of the United States and involved the requisite amount, *if any was requisite;* so there can be no doubt that the case was within the general jurisdiction conferred on the district courts by Sec. 24 of the Judicial Code . . ." (Emphasis added.)

Appellee also cites the decision of this Honorable Court in *Van Camp Sea Food Co. v. Nordyke,* 140 F. (2d) 902, 1944 A. M. C. 559. In that case this Honorable Court was presented with a direct contention that the law side of the district court had no jurisdiction to hear and determine either cause of action alleged in the complaint because there was no allegation or proof of diverse citizenship. This Court stated, in answering that contention, as follows:

> "The Jones Act is a remedial statute and as such it should be liberally construed to accomplish the declared object of the legislation, 'to provide for the promotion and maintenance of the American merchant marine.' This desideratum must be attained in consonance with the plain meaning of the wording of the statute.
>
> The *sole* jurisdictional provision incorporated in the Act is that 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' This requirement is a modification of that imposed by the Judiciary Act, 1 Stat. 76, 77, relating to other suits of a civil nature at common law, and when fulfilled confers on a District Court

> of the United States the requisite authority to hear and determine an *action at law* for damages by an injured seaman regardless of his citizenship." (Emphasis added.) (140 F. (2d) at 904, 905.)

A Petition for Writ of Certiorari was filed by the Van Camp Sea Food Company in the foregoing case and seven questions were presented for the consideration of the Court. Question No. 2 is as follows:

> "In the absence of allegations and proof showing diversity of citizenship, may a seaman maintain an action for damages at law in a United States District Court, when his claim is predicated upon an alleged negligent failure on the part of the master of a vessel to provide medical care?"

In the Specifications of Error to be urged in the United States Supreme Court, the petition stated, in part, that the "Circuit Court of Appeals erred in holding that the law side of the District Court of the United States had jurisdiction to hear and determine either cause of action alleged in the complaint."

The petitioners in their petition for writ of certiorari and brief in support thereof quoted that portion of the judgment of this Honorable Court, hereinabove set forth (140 F. 2d, at 904, 905) and the brief presented the following argument on the subject:

> "If the foregoing statement is correct, an injured seaman would also be entitled to maintain an action at law for damages in a district court of the United States with a jury furnished at the expense of the taxpayers, even though the amount involved were only five dollars.

> "This part of the decision of the court below is squarely in the teeth of the decisions of this Honorable Court in *Panama R. Co. v. Johnson,* 264 U. S. 375, 68 L. Ed. 748 and *Engel v. Davenport,* 271 U. S. 33, 70 L. Ed. 813, in each of which the Court said that the Jones Act had nothing whatever to do with the general jurisdiction of the district courts and that the language referred to by the court below relates to *venue* only."

The United States Supreme Court denied said petition for writ of certiorari on June 5, 1944 (322 U. S. 760, 88 L. Ed. 1587). It must, therefore, be assumed that the Supreme Court approved the statement of the law with reference to jurisdiction as set forth in the judgment of this Honorable Court. If that statement made by this Court is correct, then it is obvious that the District Court of the United States, on the admiralty side, has no jurisdiction of the cause of action or the person of appellee.

In addition to the foregoing points and authorities, appellee directs the attention of this Honorable Court to the proposition that one of the modifications of the therefore existing common law right or remedy in cases of personal injury to railway employees was the proviso, in the Federal Employers' Liability Act, that its provisions were applicable only with reference to a railway employee injured while he is employed by a common carrier "while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations."

Appellee contends that it clearly follows from a consideration of the statutes involved that the Honorable Trial Court was without jurisdiction to entertain the claimed cause of action of the appellant. Some courts have assumed that the Jones Act adopted by reference thereto the Federal Employers' Liability Act. This assumption is fallacious because only those portions of the Federal Employers' Liability Act which modified or extended the theretofore existing common law right or remedy applicable to cases of personal injury sustained by railway employees were incorporated in the Jones Act.

Statement of the Pleadings.

The appellant does not call the attention of this Honorable Court to the allegations in the libel or the issues raised by the Answer of the appellee. As already pointed out, the libel alleges that the appellee had its principal place of business in the County of Los Angeles, State of California. [Ap. 3.] The Answer admitted that the appellee was and is a corporation organized and existing under and by virtue of the laws of the State of California and licensed to do business therein "but denies that its principal place of business is in the County of Los Angeles and alleges that its principal place of business is in the city and county of San Francisco, State of California." [Ap. 8.]

The Third Article in the libel alleges "that at all times herein mentioned the Deconhil Shipping Company was and is the operator of and owner *pro haec vice* of the said S.S. 'Mesa Verde', for and in behalf of the United States of America, acting by and through the War Shipping Administration." [Ap. 4.] In its Answer appellees "denies

the allegations and each thereof in the Third Article." [Ap. 9.]

The foregoing allegations in the first cause of action of the libel are incorporated in the second cause of action (the cause of action for damages for personal injuries) and the Answer of the appellee to the allegations of the first cause of action were incorporated by reference thereto in its answer to the allegations in the second cause of action. [Ap. 10.]

In the Ninth Article the libel states certain legal conclusions which, of course, are redundant and irrelevant matter inserted in the pleading and will be ignored by this Honorable Court in determining whether or not the libel states facts sufficient to constitute a cause of action.

In the Tenth Article the appellant alleges that "while descending an unlighted stairway to the steering engine room, libelant stepped into a bucket negligently and carelessly left upon said second step of said stairway, precipitating and throwing the plaintiff *(sic)* to the deck below, a distance of approximately ten feet." [Ap. 6.] This Article does not allege any facts. The recital that the bucket was "negligently and carelessly left upon said second step of said stairway" does not satisfy the requirements of pleadings in admiralty causes of action. Negligence cannot be alleged generally but the particular act must be specified. There is no allegation in the libel that the appellee had anything whatsoever to do with the leaving of any bucket upon any step of the stairway. There is no allegation in the libel that any agent or employee of the appellee, acting in the course of his employment, or otherwise, left the bucket upon the second step of the stairway. It can be reasonably inferred from the allegations of the libel that the appellant himself had left the bucket

on the step, if any member of the crew had done so. There is no allegation in the libel stating that the only persons aboard the vessel were employees of appellee. Therefore it cannot be inferred that if some person did leave a bucket upon the step that it must have been some employee of appellee. In any event, the Answer denied the allegations of conclusions set forth in the Tenth Article. [Ap. 11.]

The Eleventh Article is nothing but a conclusion of the pleader.

The libelant fails to allege the following required facts in order to state a cause of action pursuant to the Jones Act:

1. There is no allegation that the appellant was a seaman in the employ of appellee.

2. There is no allegation of facts showing that any injury sustained by appellant resulted in whole or in part from the negligence of any agent or employee of appellee or by reason of any defect or insufficiency, due to appellee's negligence, in the vessel or its appliances or equipment.

3. There is no allegation that the appellant was injured while engaging in interstate or foreign commerce or that the appellee was engaged in interstate or foreign commerce.

4. There is no allegation that the vessel was a merchant vessel. As a matter of fact the libel precludes any inference that the vessel was being operated as a part of the merchant marine or as a vessel engaged in commerce of any kind. The Third Article alleges that the S.S. Mesa Verde was being operated "for and in behalf of the United States of America, acting by and through the *War Ship-*

ping Administration." [Ap. 4.] Therefore it appears on the face of the libel that the vessel was a public vessel for the simple reason that the War Shipping Administration had nothing to do with commerce of any kind.

5. There is no allegation in the libel stating that the principal office of Deconhil Shipping Company was or is located in the Southern District of California.

The libel, because of the foregoing omissions and each thereof, does not comply with the requirements of General Admiralty Rule 22. That rule requires that "the libel shall also propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article." This rule precludes any allegation of a conclusion and requires that all facts upon which a libelant must rely in support of his suit shall be stated clearly and distinctly.

Statement of the Evidence.

The evidence consisted of the testimony of the appellant and Charles M. Rathbun, the master of the vessel, and the following exhibits: Libelant's Exhibit No. 1 consists of four abstracts showing diagnosis and medical treatment; Respondent's Exhibit A is a photostatic copy of the Shipping Articles; Respondent's Exhibit B, for identification, is a photograph; Respondent's Exhibit C is a report of accident prepared by the purser of the vessel and signed by the master.

Appellant, Eugene C. Watson, testified that he went to his quarters and then went direct downstairs and there happened to be a bucket there there on the steps; he couldn't see; it was dark and the light in the hallway was out; just burned out; that as he stepped onto the place to go down the steps it was a pretty steep incline, about a 45-degree, and that as he stepped down he couldn't see very well but had a hold of the handrail and let go of the rail and stepped into the bucket. [R. T. 6-7.]

Appellant testified that his arm was swollen. [R. T. 13.] However, the master of the vessel testified that when he saw the appellant a day or two after the vessel left Honolulu, the appellant claimed he couldn't sleep because his arm hurt him so bad. The master testified:

> ". . . So I examined the arm, and there wasn't any outward appearance of anything wrong."

Appellant had no other sign of injury about him any place that the master could see excepting on the left arm and that the appellant complained of no injury or hurt any place else. [R. T. 39.]

The appellant also told the master that he had been hurt by a truck ashore while crossing the street. [R. T. 38.]

In the accident report which was made out by the purser before the vessel arrived in California, the following statement appears:

> "Mr. Watson was ashore and struck by a truck, at time not thinking anything was wrong. However, when returned to the ship he fell down the ladder aft below the crew mess room." [R. T. 43.]

ARGUMENT.

POINT I.

The Credibility of the Appellant Was Impeached and the Trial Judge Did Not Believe His Testimony With Reference to the Extent of His Claimed Pain and Suffering.

In the libel the appellant alleged positively, under oath, that he "sustained a fracture of the bones in the left forearm." [Ap. 4.] The evidence introduced demonstrates that there was a simple inconsequential fracture of the ulna of appellant's left arm. The fracture did not even cause any separation of the bone. The trial judge was entitled to disbelieve the entire testimony of appellant with reference to alleged pain and suffering not only because of the loose manner in which he made his allegations in the libel but for the additional reason that the testimony of the master of the vessel and the report of accident prepared by the purser and signed by the master were, and each thereof was, sufficient to impeach the appellant. The trial judge allowed the appellant the total sum of $400.00 as damages for personal injuries, consisting of $300.00 for loss of wages and $100.00 for pain and suffering. The trial court was also entitled to compare the allegations under oath in the Seventh Article with the position taken by the appellant at the trial. It was conceded by proctor for appellant that the absolute limit of maintenance to which the appellant was entitled

was the sum of $52.00. In other words it was conceded at the trial that the appellant had been paid maintenance for all time excepting 15 days [R. T. 52-53] where Mr. Fall, proctor for Appellant, stated:

> "Incidentally, there is an additional day's maintenance to which he is entitled, and that would be the 13th day of December of 1946; so instead of $49, there would be another $3.50, which is only $52.50." [R. T. 53.]

POINT II.

The Trial Court Erred in Not Finding That the Allegations Set Forth in the Amendment to the Answer Were True.

The Amendment to the libel is set forth in the Apostles at page 13. When the case was being orally argued before the trial judge, proctor for appellant objected to any consideration of contributory negligence for the reason that it was not pleaded in the original Answer. Proctor for Appellee obtained leave of Court to file an amendment to the Answer as follows:

> "I would ask leave at this time to file an answer to conform with the proof to set up the special defense of negligence on the part of the libelant, proximately contributing to his own injury in the event the court finds that he was injured on this stairway, but alleging in substance as follows:
>
> "That if, in fact, the libelant was injured by falling down the stairway referred to in the libel, the said libelant negligently and carelessly failed to use the hand railings on each side of the stairway and negligently and carelessly failed to attempt to look where he was going and negligently and carelessly

went to a dark stairway and a dark place and as a proximate result thereof sustained any injury which the court may find he did sustain." [R. T. 58-59.]

The Court allowed the amendment. The trial Judge must therefore have considered that such a special defense was in conformity with the proof and it is difficult to understand how the trial Judge made the finding "that the allegations and each thereof contained in the Separate and Special Defense of Respondent are untrue." [Ap. 16.]

POINT III.

The Evidence Is Insufficient to Support a Judgment in Favor of Appellant on the Theory That the Appellee Was His Employer.

The Shipping Articles show that the War Shipping Administration was the actual employer of the Appellant. Executive Order No. 9054, 7 Fed. Reg. 937, as amended by Executive Order No. 9244, 7 Fed. Reg. 7327, pursuant to which the President established within the office for Emergency Management of the Executive Office of the President, a War Shipping Administration, under the direction of an Administrator appointed by and responsible to the President, provides that the *Administrator*—not the owner of any vessel—*"shall"* perform the following functions and duties:

> "The Administrator shall perform the following functions and duties: a. Control, the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and

transports owned by the Army and Navy; and (2) vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation." (Title 50, U. S. C., App., Sec. 1295.)

The allegation in the libel that the appellee "was and is the operator of and owner *pro haec vice* of the SS 'Mesa Verde' for and in behalf of the United States of America, acting by and through the War Shipping Administrator" [Ap. 4], sets forth merely the conclusions of the pleader. There was no proof offered by the appellant that the appellee was any kind of owner of the vessel where the alleged accident occurred. Neither was there any proof that the appellee employed the appellant. Neither was there any proof that the appellee was "the operator of" the SS Mesa Verde.

In any event, the allegation of the legal conclusions in the Third Article are entirely nugatory in the face of the existing law providing that the operation and use of all ocean vessels under the flag or control of the United States was subject to the exclusive control of the Administrator, War Shipping Administration. The vessel could not have been operated by Deconhil Shipping Company.

It is a legal certainty that the Administrator, War Shipping Administration, was actually using the vessel for the purpose of enabling the United States of America to carry out its obligations incident to the state of war which existed in view of the fact that no peace treaties had been signed and the war is still legally in progress. If we assume, without conceding, that the individuals actually aboard the vessel for the purpose of navigating her were general servants of appellee, they were, while

any use was being made of the vessel, the servants of the War Shipping Administration. This is so, as a matter of law and regardless of any words used by the pleader in a futile attempt to circumvent or ignore the provisions of positive law to the contrary, for the reason that the Administrator, War Shipping Administration, having the exclusive right to control the "operation and use" of the vessel could only exercise such right of absolute and exclusive control if he possessed the exclusive authoritative right to control and direct the persons engaged in any work incident to such operation and use in and about the details connected with how such work was to be done.

Therefore, Deconhil Shipping Company would not be legally liable for any tort actually committed by any such general employee aboard the vessel because the work such person may have been doing while the vessel (and necessarily its personnel) was being used by the War Shipping Administrator for the purpose of having articles transported was the work of the Administrator. Therefore, any negligent act or omission of such person was not that of a general employer but that of his employer *pro haec vice,* the War Shipping Administration, and his negligence, if any, would not be imputed to Deconhil Shipping Company. The leading case on the subject of the "loaned servant" doctrine is *Denton v. Yazoo & M. V. R. R. Co.* (1932), 284 U. S. 305. In that case the Court states:

> "Whether the railroad companies may be held liable for Hunter's act depends not upon the fact that he was their servant generally, but upon whether the work which he was doing at the time was their work

or that of another, a question determined, usually at least, by asceraining under whose authority and command the work was being done. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions, a few only of which need be cited. In *Standard Oil Co. v. Anderson,* 212 U. S. 215, 220-225, this court said:

" 'The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

* * * * * * * *

" 'To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance

of their work. Here we must carefully distinguish between authoritative directions and control, and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking.

* * * * * * * *

"'In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.'" (*Denton v. Yazoo & M. V. R. R. Co.,* 284 U. S. 305, at 308-309.)

So every similar attempt to recover from private companies for the negligence of their employees in the course of doing the work of the United States has been rejected. See *Norfolk & W. Ry. Co. v. Hall* (4th Cir., 1932), 57 F. (2d) 1004, 1008; *McLamb v. DuPont* (4th Cir., 1935), 79 F. (2d) 966; and *cf. Hardy v. Shedden Co.* (6th Cir., 1897), 78 Fed. 610, 613; *Byrne v. Kansas City, Ft. S. & M. R. R. Co.* (6th Cir., 1894), 61 Fed. 605. See also, 61 A. L. R. 290.

Apart from some *statute* providing otherwise, no corporation can be compelled, within the meaning of due process of law and the right to the equal protection of the laws (Fifth and Fourteenth Amendments, Constitution of the United States) to respond in damages to a person injured by the negligence of another unless the activities of the latter, at the time and place of the tort, was subject to the control of the corporation under such circumstances as to bring the maxim *respondeat superior* into operation and effect.

Conclusion.

It is respectfully contended by appellee that this Honorable Court should remand the case to the District Court with directions to dismiss the same for lack of jurisdiction. In the event such course does not seem in accordance with law, then the decree of the District Court should be affirmed for the reason that this Honorable Court should give considerable weight to the action of the trial Judge in disbelieving the oral testimony of the appellant in so far as his claims of pain and suffering are concerned. There is nothing shocking about the fact that the trial Judge allowed the appellant the sum of $400.00 as damages by reason of a simple crack in the small bone of his left arm and bruise in his groin. This Honorable Court is requested to make findings in favor of appellee on the subject of contributory negligence. There cannot be much question about the fact that if a man steps into a dark place and deliberately fails to use handrails which are placed there for his protection and deliberately fails to turn on a light when the same is available for him that such individual is guilty of negligence. The testimony of the appellant that the light was burned out was demonstrated by cross-examination to be a conclusion and therefore of no probative effect. If a man chooses to refuse to turn on a light and to take whatever chance of injury might result from using a dark stairway, he certainly is guilty of gross negligence.

Respectfully submitted,

LASHER B. GALLAGHER.

Proctor for Appellee.